

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission)	
On its Own Motion)	
)	
Implementation of the Federal Communications)	
Commission's Triennial Review Order with respect)	03-0593
to a Batch Cut Migration Process)	
)	
Implementation of the Federal Communications)	
Commission's Triennial Review Order with respect)	
to Potential Non-Impairment Determinations)	03-0595
Regarding Unbundled Local Switching for)	
Mass Market Customers in Specific Markets)	
)	
Implementation of the Federal Communications)	
Commission's Triennial Review Order with respect)	03-0596
to Local Loops and Dedicated Transport)	

**Opposition of Access One, Inc., BullsEye Telecommunications, Inc.,
CIMCO Communications, Inc., Focal Communications Corporation, Forte
Communications, Inc., Globalcom, Inc., Mpower Communications
Corporation, and XO Illinois, Inc. to
SBC's Motions to Dismiss Illinois Commerce Commission
Dockets 03-0593, 03-0595 and 03-0596**

Access One, Inc., BullsEye Telecommunications, Inc., CIMCO Communications, Inc., Focal Communications Corporation, Forte Communications, Inc., Globalcom, Inc., Mpower Communications Corporation, and XO Illinois, Inc. (collectively, "CLECs") hereby file their Opposition to SBC's Motion to Dismiss the above-captioned proceedings ("TRO dockets"). For the reasons discussed below, CLECs oppose SBC's Motion, and instead request that the Commission hold the TRO dockets in abeyance.

I. History of Proceedings

The FCC released its *Triennial Review Order* on August 21, 2003. In response to that order, the Illinois Commerce Commission (“ICC” or “Commission”) initiated dockets 03-0593, 03-0595 and 03-0596 (collectively, the “TRO dockets”) on September 30, 2003. On March 2, 2004, the D.C. Circuit issued its opinion in *USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (“*USTA II*”). In response to the *USTA II* opinion, the Commission issued orders on March 17, 2004 staying the TRO dockets. On June 18, 2004, SBC filed Motions to dismiss the TRO dockets.¹

II. The Commission Should Deny SBC’s Motion to Dismiss and Instead Hold the TRO Dockets in Abeyance.

In its Motion, SBC moves for dismissal because the portions of the TRO and FCC rules that delegated to the Commission the authority to undertake these proceedings have been vacated by the *USTA II* decision.² As discussed below, this decision does not justify dismissing these proceedings and essentially discarding all the evidence collected in them. If anything, holding these proceedings in abeyance is proper under the circumstances.

At this time, dismissal of these proceedings is inappropriate because the FCC could, under its new rules, use the information already collected in the TRO dockets in its effort to determine whether mass market switching, high capacity loops and transport should be made available as UNEs in Illinois. As the Commission may know, the FCC is expected to release interim rules in the wake

¹ SBC Illinois’ Motion to Dismiss Triennial Review Proceedings (“Motion to Dismiss”) (June 18, 2004).

² Motion to Dismiss at 1-2.

of the issuance of the D.C. Circuit's decision. The FCC has also stated that it plans to adopt permanent unbundling rules by the end of this year. In implementing any new rules that require a state-specific fact-gathering effort, the FCC will likely take the lead rather than the states. Holding the TRO dockets in abeyance rather than dismissing them would ensure that the FCC would not have to start from scratch in compiling such Illinois-specific information. Even if the FCC ultimately decides to go beyond the record established in these dockets to make new impairment determinations for Illinois, the information in these records is bound to be helpful to it.

The FCC inevitably will require Illinois-specific data to implement any permanent rules that it adopts. Indeed, any impairment analysis the FCC undertakes pursuant to the *USTA II* remand must continue to be granular under the requirements of *USTA I*.³ In *USTA I*, the D.C. Circuit found that the Act requires “a more nuanced concept of impairment than is reflected in findings ... detached from any specific markets or market categories.” *USTA I*, 290 F.3d at 426. It reaffirmed this requirement throughout *USTA II*. Therefore, the FCC will need to look at Illinois-specific data before making any granular impairment decisions regarding Illinois and much of that raw information has already been collected in the TRO dockets.

Furthermore, *USTA II* made clear that the FCC may consider information collected by the states and their recommendations. In fact, the D.C. Circuit recognized that states can provide valuable input into unbundling decisions, both

³ *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

in gathering facts and providing its opinion on how those decisions affect critical local competition issues. As the D.C. Circuit held, “a federal agency may turn to an outside entity for advice and policy recommendations, provided the agency makes the final decision itself.”⁴ Holding these proceedings in abeyance therefore makes perfect sense and recognizes that the Commission, in supporting the FCC in this manner, will need to provide to the FCC information that, for the most part, has already been collected in the TRO dockets.

FCC Commissioners have even indicated their desire to have the states assist them in this manner and make the most of the data collected by them. For instance, FCC Commissioner Kevin Martin stated that “I am confident that, irrespective of the final outcome, the relevant data and factual information you have and will gather as part of the competitive market analysis will be vital to advancing the cause of local competition in the next phase of the Commission’s process.”⁵ Commissioner Martin further indicated that the FCC would ask the states “for much of the same information even if the FCC were to make those decisions on its own”.⁶

More recently, in a speech before the Southeastern Association of Regulatory Utility Commissioners, FCC Commissioner Michael Copps stated:

But as we face the new world of transitional rules, the work you’ve done before becomes even more relevant. Many of you responded to our call for state analysis of the availability of switching, high capacity loops and transport. Now you need to help us again. *If*

⁴ *USTA II*, slip op. at 17.

⁵ See <http://www.fcc.gov/commissioners/martin/documents/NARUC3-8-04.pdf>.

⁶ *Telecommunications Reports State News Wire*, March 9, 2004. “The gathering of the factual information is important in implementing whatever standard gets applied,” he reportedly said. *Id.*

you've collected information – bring it on. If you've gathered facts – show us. If you've amassed data and analyzed it based on operational and economic facts – let us see what you've learned. State commission knowledge about the state of truly local competition can be so much better than anything we cook up far away in Washington.⁷

Holding the TRO dockets in abeyance is fitting because dismissal would ignore the significant resources that all the parties poured into these proceedings to develop the records, including resources necessary to propound and answer comprehensive data requests and submit multiple sets of testimony. SBC's motion also fails to recognize that CLECs, who were nonparties to the proceedings, had to spend tremendous amount of time and resources responding to data requests that they were ordered to answer. Since much of the information that the FCC will likely require in implementing its new rules is at the Commission's finger tips and contained in the TRO dockets, abeyance over dismissal is proper so that CLECs will not have to go through the process of providing the *same information* that has already been gathered in the TRO dockets.

CLECs are aware of no potential harm from allowing the TRO dockets to remain open yet abated. Dismissing them, however, may make it more difficult for this Commission or the FCC to later use the record developed in them. Thus, rather than taking that approach, the Commission should make every effort to preserve the information that the parties' have gathered to date in the TRO dockets. Holding the proceedings in abeyance does just that.

⁷ *Remarks of Commissioner Michael J. Copps, Southeastern Association of Regulatory Utility Commissioners, Charleston, South Carolina, June 15, 2004.*

Given the above, the Commission should deny SBC's Motion and hold the TRO dockets in abeyance pending further FCC direction. The Texas Public Utilities Commission recently did so⁸ and the ICC should as well.

III. Conclusion

For the reasons discussed herein, the CLECs respectfully request that the Commission deny SBC's Motion to Dismiss and instead hold the TRO dockets in abeyance pending further direction from the FCC.

Respectfully submitted,

Thomas H. Rowland
Stephen J. Moore
Kevin D. Rhoda
Rowland & Moore LLP
200 West Superior Street
Suite 400
Chicago, Illinois 60610

Counsel for Access One, Inc., BullsEye
Telecommunications, Inc., CIMCO
Communications, Inc., Focal Communications
Corporation, Forte Communications, Inc.,
Globalcom, Inc., Mpower Communications
Corporation, and XO Illinois, Inc.

Russell M. Blau
Philip J. Macres
Swidler Berlin Shereff Friedman, LLP
The Washington Harbour
3000 K Street, NW, Suite 300
Washington, DC 20007

⁸ Public Utility Commission of Texas, Order abating dockets 29175, 28744, 28745, and 28607 (June 21, 2004).

Counsel for Focal Communications
Corporation, Globalcom, Inc., and Mpower
Communications Corporation

CERTIFICATE OF SERVICE

I, Kevin D. Rhoda, an attorney, certify that I served a copy of the Opposition of Access One, Inc., BullsEye Telecommunications, Inc., CIMCO Communications, Inc., Focal Communications Corporation, Forte Communications, Inc., Globalcom, Inc., Mpower Communications Corporation, and XO Illinois, Inc. to SBC's Motions to Dismiss Illinois Commerce Commission Dockets 03-0593, 03-0595 and 03-0596. to all parties on the attached service list via e-mail on July 2, 2004.

Kevin D. Rhoda
Rowland & Moore LLP
200 West Superior Street
Suite 400
Chicago, Illinois 60610

Service List

Karl B. Anderson
Corporate/Legal
Illinois Bell Telephone
Company
225 West Randolph, Floor
25D
Chicago, IL 60606

Sean R. Brady
Office of General Counsel
Illinois Commerce
Commission
160 N. LaSalle St., Ste. C-
800
Chicago, IL 60601-3104

Randolph R. Clarke
Assistant Attorney General
Public Utilities Bureau
Attorney General's Office
100 W. Randolph, 11th Fl.
Chicago, IL 60601

William J. Cobb III
Covad Communications
Company
100 Congress Ave., Ste.
2000
Austin, TX 78701

Matt C. Deering
Atty. for IITA
Meyer Capel, a
Professional Corporation
306 W. Church St.
PO Box 6750
Champaign, IL 61826-
6750

Joseph E. Donovan
Atty. for Intervenors
Kelley Drye & Warren LLP
333 W. Wacker Dr., Ste.
2600
Chicago, IL 60606

Douglas A. Dougherty
Illinois
Telecommunications
Association, Inc.
300 E. Monroe St., Ste.
306
PO Box 730
Springfield, IL 62705

Carmen Fosco
Office of General Counsel
Illinois Commerce
Commission
160 N. LaSalle St., Ste. C-
800
Chicago, IL 60601-3104

Harry Gildea
Atty. for DoD/FEA
Snively King, Majoros,
O'Connor & Lee, Inc.
1220 L St., NW, Ste. 410
Washington, DC 20005

John Gomoll
Vice President
AT&T Communications of
Illinois, Inc.
222 W. Adams, Ste. 1500
Chicago, IL 60606

Michael Guerra
Atty. for Verizon
North/South Inc.
Sonnenschein Nath &
Rosenthal LLP
8000 Sears Tower
Chicago, IL 60606

William A. Haas
McLeodUSA
Telecommunications
Services, Inc.
6400 C St., S.W.
Cedar Rapids, IA 52404

Cheryl Hamill
Atty.
Law Dept.
AT&T Communications of
Illinois, Inc.
222 W. Adams St., Ste.
1500
Chicago, IL 60606

James R. Hargrave
Assistant Vice President
Public Policy & External
Affairs
Verizon North/South Inc.
1312 E. Empire St.
PO Box 2955
Bloomington, IL 61702-
2955

Matthew L. Harvey
Office of General Counsel
Illinois Commerce
Commission
160 N. LaSalle St., Ste. C-
800
Chicago, IL 60601-3104

Michael B. Hazzard
Kelley Drye & Warren, LLP
1200 19th St., NW, Ste.
1500
Washington, DC 20036

Peter R. Healy
Manager
CLEC External Relations
TDS Metrocom, LLC
525 Junction Rd., Ste.
6000
Madison, WI 53717

Rhonda J. Johnson
Vice President
Regulatory
Illinois Bell Telephone
Company
555 Cook St., Fl. 1E
Springfield, IL 62721

Trey Judy
Director, Regulatory
Affairs
Gallatin River
Communications L.L.C.
103 S. Fifth St.
PO Box 430
Mebane, NC 27302

Henry T. Kelly
Atty. for Intervenor
Kelley Drye & Warren LLP
333 W. Wacker Dr., Ste.
2600
Chicago, IL 60606

Thomas Koutsky
Vice President
Law and Public Policy
Z-Tel Communications,
Inc.
1200 19th St., N.W., Ste.
500
Washington, DC 20036

Michael J. Lannon
Office of General Counsel
Illinois Commerce
Commission
160 N. LaSalle, Suite C-
800
Chicago, IL 60601

Owen E. MacBride
Atty. for Intervenor
Schiff Hardin & Waite
6600 Sears Tower
Chicago, IL 60606

Robert W. McCausland
Sage Telecom, Inc.
805 Central Expy. South,
Ste. 100
Allen, TX 75013

Francie McComb
Sage Telecom, Inc./Talk
America Inc.
6805 Route 202
New Hope, PA 18938

Dennis K. Muncy
Atty. for IITA
Meyer Capel, a
Professional Corporation
306 W. Church St.
PO Box 6750
Champaign, IL 61826-
6750

Joseph D. Murphy
Atty. for IITA
Meyer Capel, a
Professional Corporation
306 W. Church St., PO
Box 6750
Champaign, IL 61826-
6750

Julie Musselman
Telecommunications
Policy Analyst
Kelley Drye & Warren LLP
333 W. Wacker Dr.
Chicago, IL 60606

Brad E. Mutschelknaus
Atty. for Intervenor
Kelley Drye & Warren, LLP
1200 19th St., NW, Ste.
1500
Washington, DC 20036

Nora A. Naughton
Office of General Counsel
Illinois Commerce
Commission
160 N. LaSalle St., Ste. C-
800
Chicago, IL 60601

Peter Q. Nyce Jr.
General Attorney
Regulatory Law Office
Department of the Army
JALS-RL
901 N. Stuart St., Ste. 713
Arlington, VA 22203-1837

Mark Ortlieb
Illinois Bell Telephone
Company
25D
225 W. Randolph
Chicago, IL 60606

Edward Pence
Director
Illinois Consolidated
Telephone Company
121 S. 17th St.
Mattoon, IL 61938

Document Processor
Citizens
Telecommunications
Company of Illinois
d/b/a Frontier Citizens
Communications of Illinois
C T Corporation System
208 S. LaSalle St.
Chicago, IL 60604

John E. Rooney
Atty. for Verizon
North/South Inc.
Sonnenschein Nath &
Rosenthal LLP
8000 Sears Tower
Chicago, IL 60606

David O. Rudd
Director, State
Government Relations
Gallatin River
Communications L.L.C.
625 S. Second St., Ste.
103-D
Springfield, IL 62704

Susan L. Satter
Illinois Attorney General's
Office
11th Floor
100 W. Randolph
Chicago, IL 60601

Kevin Saville
Citizens
Telecommunications
Company of Illinois
d/b/a Frontier Citizens
Communications of Illinois
2378 Wilshire Blvd.
Mound, MN 55364

Kristen M. Smoot
Director Regulatory Affairs
RCN Telecom Services of
Illinois, LLC
350 N. Orleans St., Ste.
600
Chicago, IL 60654

Louise A. Sunderland
Illinois Bell Telephone
Company
Floor 25D
225 W. Randolph Street
Chicago, IL 60601

Sharon Thomas
Director of Regulatory
Affairs
Talk America Inc.
12001 Science Dr., Ste.
130
Orlando, FL 32826

Stephanie Timko
Sage Telecom, Inc.
805 Central Expy. South,
Ste. 100
Allen, TX 75013

Darrell Townsley
Midwest Region Public
Policy
MCI WorldCom
Communications, Inc.
205 N. Michigan Ave.,
11th Fl.
Chicago, IL 60601

A. Randall Vogelzang
Verizon Services Group
600 Hidden Ridge
Irving, TX 75038

Ron Walters
Regional Vice President
Z-Tel Communications,
Inc.
601 S. Harbour Island
Blvd., Ste. 220
Tampa, FL 33602

Michael W. Ward
Atty. for Intervenors
Michael W. Ward, P.C.
1608 Barclay Blvd.
Buffalo Grove, IL 60089

Nancy Wells
AT&T Communications of
Illinois, Inc.
620 S. 5th St.
Springfield, IL 62703

Rosalind Williams
Talk America Inc.
12001 Science Dr., Ste.
130
Orlando, FL 32826